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No. 556

In the Supreme Court of the United States

October Term, 1942.

Board of County Commissioners of the County of Creek, State of Oklahoma, a Municipal Corporation; H. L. Payne, County Treasurer of the County of Creek, State of Oklahoma; W. Howard Seay, County Assessor of the County of Creek, State of Oklahoma, and W. B. Key, County Clerk of the County of Creek, State of Oklahoma, *Appellants*,

vs.

Evelyn Seber, Otherwise Known as Osharsha John, Jimmie Powshiek and Juanita Deere, Now McIntosh, *Respondents.*

BRIEF OF RESPONDENTS.

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vs.

Evelyn Seber, Otherwise Known as Osharsha John, Jimmie Powshiek and Juanita Deere, Now McIntosh, *Respondents.*

BRIEF *of* RESPONDENTS.

Statement of the Case.

This action was instituted in the United States District Court for the Northern District of Oklahoma by plaintiffs below, respondents herein, who are unenrolled full-blood members of the Creek or Muskogee Tribe of Indians, to recover taxes alleged to have been paid by them under compulsion and duress, and which are alleged to have been levied by defendants below, petitioners herein, against their restricted Indian lands, in violation of Section 2 of the

Act of Congress of June 20, 1936 (49 Stat. 1542), and the amendatory Act of May 19, 1937 (50 Stat. 188); and for a declaratory judgment decreeing the tax exempt status of their lands falling within the provisions of the 1937 Act.

In order to more clearly present the issues, and for the convenience of the court, we preface our further statement of the case with the citation of the applicable statutory provisions, as follows:

The Act of Congres of June 20, 1936 (49 Stat. 1542), provides:

Section 1. "That there is hereby authorized to be appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of $25,000.00 to be expended under such rules and regulations as the Secretary of the Interior may prescribe, for payment of taxes, including penalties and interest, assessed against individually owned Indian land the title to which is held subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of an Indian, where the Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase, it would be nontaxable, and for redemption or reacquisition of any such land heretofore or hereafter sold for non-payment of taxes."

Section 2. "All lands, the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress."

The Act of Congress of May 19, 1937 (50 Stat. 18), amending Section 2 of the Act, *supra*, is as follows:

"All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be non-taxable until otherwise directed by Congress: *Provided*, that the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; and provided further, that the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred sixty acres, or the village, town, or city property, not exceeding in cost $5,000.00, to be designated as a homestead."

Section 1 of the 1936 Act is not codified in either United States Statutes Annotated or in Federal Codes Annotated, but Section 2 of this Act is found in 5 F. C. A., Title 25, Section 412a, and the 1937 Act is found in the pocket supplement to this volume, under the same number.

Agreed Statement of Facts.

The cause was submitted to the Honorable F. E. KENNAMER, District Judge, upon an agreed statement of facts.

Inasmuch as the petitioners have filed no brief, other than their supporting brief to the petition for writ of *certiorari*, in which they have omitted specific reference to the facts involved, we set forth, in substance, the material part of the agreed statement of facts, as follows (R. 37-46):

The plaintiffs are unenrolled full-blood members of the Creek or Muskogee Tribe of Indians; the defendant, Board of County Commissioners of the County of Creek, State of

Oklahoma, is a municipal corporation, organized and existing under the laws of such state; and the defendants, H. L. Payne, W. Howard Seay and W. B. Key, are the qualified and acting County Treasurer, Assessor, and County Clerk, respectively, of such county.

Wosey John, now Deere, the mother of plaintiffs, was a full-blood member of the Creek or Muskogee Tribe of Indians, enrolled as such opposite roll number 9546 on the approved rolls of such tribe, and a large sum of money accumulated to her credit in the custody of the Secretary of the Interior from the sale of oil and gas from her restricted Indian lands.

The Secretary of the Interior invested a portion of this money in the purchase, in her behalf, of the three tracts of land which form the basis of this action; and he thereafter invested large sums in the erection of permanent improvements on such lands. One of such tracts was purchased on December 11, 1915; one on March 24, 1920; and one on December 8, 1927.

The conveyances so taken by the Secretary at the time of the purchase of such respective lands each contained the following provision of restraint (R. 14, 17, 19):

> "* * * subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described, or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification, unless made with the consent of and approved by the Secretary of the Interior."

On April 4, 1931, Wosey John, now Deere, in consideration of love and affection, made, executed and delivered

plaintiffs her certain deed in writing, thereby conveying jointly to plaintiffs the three tracks of land so purchased by the Secretary of the Interior; reserving, however, the grantor, a life estate in each.

This deed was submitted to and approved by the Secretary of the Interior on April 3, 1931, and it contained the following provision of restraint (R. 21-22):

"* * * subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described, or the title thereto, shall be of any force and effect, unless approved by the Secretary of the Interior or the restrictions from said lands are otherwise removed by operation of law."

On December 10, 1937, Wosey John, now Deere, made and delivered to plaintiffs her additional conveyance thereby conveying to them the interest reserved in the deed of March 4, 1931. This deed contained provisions of restraint identical with those contained in the former deed (R. 22-23).

On December 16, 1937, the plaintiffs, with the consent of the Secretary of the Interior, executed a certificate of tax exemption, in conformity with the 1937 Act, and selected the 80-acre tract located in Section 27 and the 7½-acre tract located in Section 36, as the property to be designated as their tax-exempt homestead under such Act of Congress (R. 24-25).

This certificate was approved by the Secretary of the Interior on March 24, 1938, and was filed in the office of the County Clerk of Creek County, Oklahoma, on April 12, 1938.

The county assessor listed each of such tracts of land for ad valorem tax purposes in Creek County for the tax

year 1936, and subsequent years and caused ad valorem taxes to be levied against the same, and caused such taxes to be extended upon the tax rolls of said county. The plaintiffs thereafter paid a part of the taxes so levied against such lands with penalties, but did not, at the time of making such payments, serve notice on the county treasurer that such taxes were being paid under protest in the manner required by the Statutes of Oklahoma. The stipulation specifically sets forth the amount of taxes levied against each tract for each respective year; the amounts paid by plaintiffs, and the dates of such payment.

The defendants claimed and asserted a lien upon such respective lands for the taxes so levied against the same for each of such years, with penalties at the rate of 12% per annum, and if the plaintiffs had not paid such taxes, with penalties, defendants would have advertised and sold such lands for the purpose of enforcing the collection of such taxes in the manner provided by the Statutes of Oklahoma for the sale and resale of lands for the collection of delinquent ad valorem taxes.

It was stipulated, as to the taxes which remain unpaid, that the defendants assert and claim a perpetual lien upon such respective lands for the amount so levied against the same, with penalties at the rate of 12% per annum; and that unless such taxes, with penalties, are paid, the defendants will, unless restrained, offer such lands for sale and will sell the same in the manner provided by the laws of Oklahoma for the sale and resale of lands for the collection of delinquent ad valorem taxes.

It was also stipulated that the defendants intend to assess the lands described in the certificate of tax exemption for ad valorem taxes for the year 1941, and future years,

and that, unless restrained, they cause ad valorem taxes to be levied against the same for such years, and assert a perpetual lien upon such lands for the amounts so to be levied, with penalties thereon, and that if the taxes so to be levied are not paid when due, the defendants will, unless restrained from so doing, offer for sale and sell such lands for the collection of such ad valorem taxes.

It was further agreed that the plaintiffs have, at all times since the year 1931, occupied the lands located in Section 27, Township 18 North, Range 11 East, as their home and homestead.

The Judgments of the Courts Below.

The trial court made findings of fact conforming to the agreed statement of facts, and made conclusions of law in which it was concluded in substance (Tr. 46-48):

A. That the three tracts of land involved in this action were exempt from taxation by the State of Oklahoma, and its municipal subdivisions of government, for the tax years 1936 and 1937 under the provisions of the 1936 Act; and that the lands described in the certificate of tax exemption were exempt from such taxation for the years 1938, 1939 and 1940, under the provisions of the 1937 Act, and are now and will continue to be so exempt from such taxation so long as the same are owned by and remain the homestead of the plaintiffs, and their restricted heirs, and until restrictions against alienation are removed in the manner provided by law;

B. That the taxes so levied by defendants for the years involved were imposed in violation of such Acts of Congress and were illegal and void; and the payments made by plaintiffs were made under compulsion and duress, and were

made by them to quiet their title against the illegal and void tax liens asserted by defendants and to prevent the accumulation of penalties and the sale of their lands for the collection of such illegal and void taxes.

C. That plaintiffs are entitled to recover the portion of such illegal taxes so paid by them, and to have the portion thereof which remains unpaid cancelled and set aside; and are entitled to a declaratory judgment decreeing the lands designated in the certificates of homestead exemption to be exempt from taxation for the tax year 1940, and so long thereafter as such lands belong to and remain the homestead of plaintiffs, and their restricted heirs, and until restrictions against alienation are removed in the manner provided by law.

A formal decree was entered in the cause conforming to the conclusions of law (R. 48-50); to reverse which an appeal was taken by petitioners herein to the Circuit Court of Appeals for the Tenth Circuit.

Upon such appeal the judgment of the trial court was modified in that it was there held that the immunity from taxation created by the Act of June 20, 1936, *supra*, did not become effective so as to exempt the lands in question from taxation until January 1, 1937. In all other respects the judgment of the trial court was affirmed.

The judgment of the Honorable Circuit Court of Appeals for the Tenth Circuit is reported as *Board of County Commissioners of Creek County* v. *Seber, et al.*, 130 F. (2d) 663.

The Petitioners' Specifications of Error.

Although the petitioners have set forth five separate specifications of error, at pages 10 and 11 of their supporting brief to the petition for writ of *certiorari*, yet, the last three of these assignments are unsupported by argument, and are, as we believe, without support in the record in this appeal.

We refer to our former brief in answer to these last named assignments of error.

We shall present our argument and authorities in answer to the remaining specifications of error separately under the following counter-propositions:

COUNTER-PROPOSITION NUMBER ONE—

The Acts of Congress here in question are Constitutional;

COUNTER-PROPOSITION NUMBER TWO—

The lands involved in this action fall within the exemption created by the Acts of Congress, supra, and such lands were and are immune from taxation by the State of Oklahoma, and its municipal subdivisions of government.

ARGUMENT *and* AUTHORITIES.

COUNTER-PROPOSITION NUMBER ONE.

The Acts of Congress Here in Question Are Constitutional.

The petitioners, in their first specification of error (their brief, page 10), assert that Section 2 of the Act of Congress of June 20, 1936 (49 Stat. 1542, 25 U. S. C. A. 412), as amended by the Act of May 19, 1937 (50 Stat. 188, 25 U. S. C. A. 412a), is unconstitutional.

The basis of this contention, as stated by them, is that Congress "cannot for the purpose of exemption from state taxation, create a 'Federal instrumentality' out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood."

This contention finds full answer in the language of the acts in question, which, we assert, clearly demonstrates that these instrumentalities were not created for the purpose of securing an exemption from state taxation, but rather the immunity from such taxation was provided by these acts to preserve instrumentalities theretofore created under congressional authority.

The power of Congress to impose restraint upon the alienation or incumbrance of lands of its Indian wards cannot be doubted, whether such lands are acquired by private purchase or not. This power rests upon the dependent character of the Indians, their recognized inability to safely conduct business affairs, and the peculiar duty of the Federal Government to safeguard their interests and protect them against the greed of others and their own improvidence. *Sunderland v. United States*, 266 U. S. 226, 45 S. Ct. Rep. 64, 69 L. ed. 259.

Likewise, the rule that Congress, acting within the limits of the Federal Constitution, has power to exempt its instrumentalities from state taxation is too well settled to leave room for doubt. *Pittman* v. *Home Owners Loan Corp.*, 308 U. S. 21, 60 S. Ct. Rep. 15, 84 L. ed. 11; *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 41 S. Ct. 243, 65 L. ed. 577; *Bank of New York* v. *New York County*, 9 Wall. 26, 19 L. ed. 60; *Thomson* v. *United Pacific Railway Co.*, 9 Wall. 579, 19 L. ed. 792.

This same rule was announced in *Shaw* v. *Gibson-Zahniser Corp.*, 276 U. S. 575, 48 S. Ct. 333, 72 L. ed. 790, wherein it was held that, although lands of the class involved in this appeal were not exempt from state taxation in the absence of legislation by Congress to that effect, yet that it was within the power of Congress by appropriate legislation to grant such immunity. This rule is announced in that case as follows:

> "*There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks.* See *Goudy* v. *Meath*, 203 U. S. 146, 51 L. ed. 130, 132, 27 Sup. Ct. Rep. 48; *Gromer* v. *Standard Dred. Co.*, 224 U. S. 362, 371, 56 L. ed. 801, 805, 32 Sup. Ct. Rep. 499; *Fidelity & D. C.* v. *Pennsylvania*, 240 U. S. 319, 323, 60 L. ed. 664, 668, 36 Sup. Ct. Rep. 298; *Union P. R. Co.* v. *Peniston*, 18 Wall. 5, 21 L. ed. 787; *Choctaw O. & G. R. Co.* v. *Mackey*, 256 U. S. 531, 537, 65 L. ed. 1076, 1080, 41 Sup. Ct. Rep. 582; *Central P. R. Co.* v. *California*, 162 U. S. 91, 126, 40 L. ed. 903, 915, 16 Sup. Ct. Rep. 766. *These lands we take to be of that character.*"

The same rule is applied in *United States* v. *Wright*, (C. C. A. 4) 53 F. (2d) 300, *certiorari* denied 285 U. S. 539, 52 S. Ct. 312, 76 L. ed. 932.

In that case the court held that the provisions of the Act of Congress of June 4, 1924 (43 Stat. 376), exempting from state taxation lands belonging to the Eastern Band of Cherokee Indians, conveyed to the United States in trust, until division and allotment had been completed and restrictions on alienation removed, was constitutional, although the Indian's title had been acquired from the state, and although the lands had been subject to state taxation at all times prior to the enactment of the statute there in question.

The petitioners do not challenge the correctness of the rule announced in the above cited cases, and make no effort to show wherein this rule is not applicable to the Acts of Congress here in question.

On the other hand, they rely solely upon the decision in *Helvering* v. *Mountain Products Co.*, 303 U. S. 376, 58 S. Ct. 623, 82 L. ed. 907, to support their contentions in this appeal.

We respectfully assert that a consideration of the decision in that case clearly demonstrates that it is not authority here, for in that case no question was presented concerning the constitutional power of Congress to grant immunity from taxation to an instrumentality of the Federal Government.

We respectfully assert that Congress had the Constitutional authority to enact the statutory provisions here in question; that they are binding upon the courts as the law of the land (*Pittman* v. *Home Owners Loan Association, supra*), and the decision of the Circuit Court of Appeals in so holding is in accord with the decisions of this Honorable Court, and should be sustained.

COUNTER-PROPOSITION NUMBER TWO.

The lands involved in this action fall within the exemption created by the Acts of Congress, *supra*, and such lands were and are immune from taxation by the State of Oklahoma, and its municipal subdivisions of government.

The petitioners contend that the lands involved in this appeal do not fall within the exemption created by the Acts of Congress, *supra*, for the reasons assigned by them, in substance: *(a)* Because the acts "apply only to a 'landless' Indian who never held land prior to the purchase of property for him out of his restricted funds;" and *(b)* because such lands were purchased with the restricted funds of respondents' mother, rather than with their own restricted funds.

On the other hand, it is our contention that the language of each of these acts is plain and unambiguous, and that it was the intention of Congress, by the passage of the 1936 Act to exempt from state taxation all lands which had theretofore been purchased in behalf of restricted Indians with restricted funds where the title to such lands is held subject to valid restrictions against alienation or encumbrance, and it was the intention of Congress, by the passage of the 1937 Act, to exempt all homesteads which fall within the same classification.

It is our position, therefore, that the test to be applied in determining whether or not the lands involved in this action fall within the ambit of the Acts of Congress, *supra*, is to determine whether or not the provisions contained in the deed executed to appellees, restraining them from alienating or encumbering these lands are valid or invalid. If these provisions are valid and the appellees are lawfully restrained from alienating or encumbering the lands, except

with the consent and approval of the Secretary of the Interior, then the lands fall within the terms of the acts, *supra*, and are nontaxable. If, on the other hand, these provisions are invalid, and the appellees have not been lawfully restrained from alienating or encumbering the lands, then such lands are not affected by the Acts of Congress, *supra*, and they are, and have been subject to ad valorem taxation by the State of Oklahoma, and its municipalities during the years involved in this appeal.

In this connection, we assert that it must be conceded that the royalties which accrued to the credit of Wosey John, now Deere, in the custody of the Secretary of the Interior were impressed with the same restrictions as were the lands from which they were derived. *Mott* v. *United States*, 283 U. S. 747, 51 S. Ct. 642, 75 L. ed. 1385; *Parker* v. *Richard*, 250 U. S. 235, 39 S. Ct. 442, 63 L. ed. 954; *United States* v. *Thurston County*, (C. C. A. 8) 143 Fed. 287; *United States* v. *Brown*, (C. C. A. 8) 8 F. (2d) 654. And it must be conceded that the Secretary of the Interior was empowered to require, as a condition to his approval of the investments in her behalf, that there be included in the deeds to her provisions restraining the alienation or encumbrance of such lands without his consent and approval. *Sunderland* v. *United States*, 266 U. S. 226, 45 S. Ct. 64, 69 L. ed. 259; *United States* v. *Goldfeder*, (C. C. A. 10) 112 F. (2d) 615.

Therefore, these lands were restricted Indian lands on March 4, 1931, the date upon which they were conveyed to the respondents by their mother, and they were so restricted on April 3rd, 1931, the date upon which such conveyance was approved by the Honorable Secretary of the Interior.

The Secretary having power to withhold his approval of such conveyance to respondents, had power to require

as a condition to his approval the inclusion in such deed of the provision restraining them, and their heirs, from alienating or encumbering such lands, except with his consent and approval. *Mott* v. *United States*, 283 U. S. 747, 51 S. Ct. 642, 75 L. ed. 1385; *Sunderland* v. *United States*, 266 U. S. 226, 45 S. Ct. 64, 69 L. ed. 259; *United States* v. *Thurston County*, (C. C. A. 8), 143 Fed. 287; *United States* v. *Goldfeder*, (C. C. A. 10) 112 F. (2d) 615.

It is therefore apparent that the provision restraining respondents and their heirs, from alienating or encumbering the lands involved herein, except with the consent and approval of the Secretary of the Interior, is valid; and for this reason, we assert that the lands involved in this case are Federal instrumentalities and fall within the classification of tax-exempt lands as defined by the Acts of Congress, *supra*.

The petitioners rely solely upon quoted excerpts from the statement made by the Honorable Elmer Thomas, Chairman of the Committee on Indian Affairs of the United States Senate, at the time the 1926 Act was under consideration, for support of their contention that the acts in question "apply only to a 'landless' Indian who had never held land prior to the purchase of property for him out of restricted funds."

We respectfully assert that the acts in question do not lend themselves to this claimed construction, and that the statement relied upon by them does not sustain their claim. In any event, this statement cannot be considered for the purpose of construing the acts in question contrary to their plain terms. *Pennsylvania Railroad Co.* v. *International Coal Min. Co.*, 230 U. S. 184, 33 S. Ct. 893, 57 L. ed. 1446.

The petitioners tender no argument in support of their statement that the immunity created by the acts in question do not apply to the lands involved in this appeal because such lands were purchased with the restricted funds of respondents' mother, rather than with their own restricted funds.

If there is any ambiguity in the language used in the 1936 Act, or any doubt as to the meaning to be ascribed thereto, it is only because of the use of the term "purchased out of the trust or restricted funds of said Indian." This has not been poinfed out or relied upon by petitioners in support of their contention.

A consideration of the 1937 Act discloses that this term is omitted from its text, and instead it employs the following language, without qualification:

> "All homesteads heretofore purchased out of trust or restricted funds of individual Indians are hereby declared to be instrumentalities of the Federal Government, and shall be non-taxable, until otherwise directed by Congress * * *."

The language of this act is plain and unambiguous.

This statute should be considered in determining the intent of Congress in the passage of the 1936 Act, if there be any doubts as to the legislative intent or the proper interpretation to be given to that act. *Tiger* v. *Western Investment Company*, 221 U. S. 286, 55 L. ed. 73.

However, we assert that the legislative intent is clearly expressed in each of the statutes under consideration, and that the exemption granted cannot be limited or restricted in the manner contended for by petitioners. We further assert that the above quoted language used in these respective statutes was employed by Congress solely to identify

the type or class of lands so declared to be Federal instrumentalities and to distinguish this classification of property from allotted and inherited lands, and from other lands acquired under congressional authority in behalf of individual Indians.

In this connection we call attention to the fact that the Act of Congress of May 10, 1928 (45 Stat. 495), provided for the exemption from taxation of allotted and inherited lands of restricted members of the Five Civilized Tribes, and that other acts have been passed by Congress dealing with the same class of property belonging to individual members of other tribes, and that Congressional authority has also been given for the acquisition of other property in behalf of individual Indians.

The 1936 Act received the consideration of the Honorable Stanley Reed, Acting Attorney General, prior to the passage of the 1937 Act, and in an opinion rendered to the Secretary of the Interior under date of February 13, 1937, in holding that this statute was applicable to property acquired for members of the Osage Tribe of Indians in Oklahoma; in the same manner and to the same extent that it is applicable to members of other tribes, he said:

> "The language of the 1936 Act is clear and unambiguous. * * * The obvious purpose of the Act of Congress is to make non-taxable lands of all Indians purchased out of trust or restricted funds and restricted to alienation or encumbrance."

This opinion is reported in Vol. 38, O. A. G., at page 577, and is set forth in full in an appendix to this brief, at page 20, *et seq.*

This administrative interpretation is entitled to great weight, and is not to be overturned unless clearly wrong,

or a different construction is plainly required. *Blanset* v. *Carden*, 256 U. S. 319, 41 S. Ct. 519, 65 L. ed. 950.

In this connection we call attention to the fact that when the certificate of tax exemption which was executed by the respondents covering the lands involved in this appeal was presented to the Secretary of the Interior for his approval, or rejection, as required by the 1937 Act, it was incumbent upon him to determine whether or not these lands came within the exemption created by the statute here in question. The approval of this certificate (R. 24) constitutes an affirmative finding by him that these lands do in fact come within the exemption so created.

This administrative construction is entitled to the same respectful consideration as the opinion of the Attorney General, *supra*.

If however, there is any doubt as to the legislative intent in the enactment of the statutes under construction, that doubt must be resolved in favor of the appellees, under the rule announced by the Supreme Court in *Choate* v. *Trapp*, 224 U. S. 665, 675, 32 S. Ct. 565, 56 L. ed. 941, in the following language:

> "But in the Government's dealings with the Indians, the rule is exactly the contrary. The construction, instead of being strict is liberal, doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people who are wards of the Nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized without exception, for more than a hundred years, and has been applied to tax questions."

We therefore respectfully assert that the lands involved in this appeal fall within the exemptions created by the

Acts of Congress, *supra*, and that the decision of the Circuit Court of Appeals in so holding is correct, and should be affirmed.

Conclusion.

We most respectfully assert that it was within the Constitutional power of Congress to enact the statutes here in question; that the respondents' lands fall within the exemption so created; and that the decision of the Honorable Circuit Court of Appeals for the Tenth Circuit in so holding is correct, and should be in all things approved and confirmed.

Respectfully submitted,

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APPENDIX.

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES.

Applicability of Act of June 20, 1936, to Members of Osage Tribe of Indians in Oklahoma.

February 13, 1937.

THE SECRETARY OF THE INTERIOR.

My Dear Mr. Secretary: Reference is made to your letter of January 4, 1937, in which you request my opinion as to whether the Act of June 20, 1936, c. 622, 49 Stat. 1542, is applicable to individual members of the Osage Tribe of Indians in Oklahoma.

That Act, entitled "An Act to Relieve Restricted Indians Whose Lands Have Been Taxed or Have Been Lost by Failure to Pay Taxes, and for Other Purposes," reads as follows:

> "That there is hereby authorized to be appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of $25,000.00, to be expended under such rules and regulations as the Secretary of the Interior may prescribe, for payment of taxes, including penalties and interest, assessed against individually owned Indian land the title to which is held subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of an Indian, where the Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be nontaxable, and for redemption or reacquisition of any such land heretofore or hereafter sold for nonpayment of taxes.

"Sec. 2. All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government, and shall be nontaxable until otherwise directed by Congress."

Section 1 of the Act authorizes the use of Federal funds for payment of taxes on certain classes of Indian lands and for redemption or reacquisition of such lands sold for nonpayment of taxes. Section 2 exempts from taxation lands held by an Indian subject to restriction against alienation or encumbrance and purchased out of trust or restricted funds. If thus appears that the statute deals with certain classes of Indian *lands* without restriction as to the classes of *Indians* to which it shall apply, and no particular tribe of Indians is mentioned. Hence, members of the Osage tribe of Indians in Oklahoma are entitled to the relief afforded by the Act to the same extent as the members of any other tribe of Indians unless they are excluded therefrom by other legislation.

It is my understanding that the Act of June 20, 1936, is the only legislation enacted by Congress dealing with the use of Federal funds for the purposes specified in Section 1 of that Act. It follows, therefore, that the provisions of that section are applicable to members of the Osage tribe as well as to members of other Indian tribes.

However, in determining whether the provisions of Section 2 of the Act are applicable to the Osage Indians, it is necessary to examine certain prior legislation having to do with the taxability of lands belonging to members of the Osage tribe.

Section 1 of the Act of March 2, 1929, c. 493, 45 Stat. 1478, provides in part:

> "Homestead allotments of Osage Indians not having a certificate of competency shall remain exempt from taxation while the title remains in the original allottee of one-half or more Osage Indian blood and in his unallotted heirs or devisees of one-half or more of Osage Indian blood until January 1, 1959: *Provided*, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres."

It is obvious that the land exempted from taxation by the main clause of this enactment is limited to homestead allotments. Considering the language of the provision as a whole, it seems clear that the purpose of the main clause is to exempt from taxation homestead allotments generally, and that the purpose of the proviso is merely to limit the amount of such homestead land that the individual Indian may hold exempt from taxation. The restriction of the proviso is made to apply only to allottees, etc., mentioned in the main provision, and there would seem to be no reason why the land referred to in the proviso should not likewise be limited to homestead allotments.

Since, therefore, the 1929 statute is concerned with homestead allotments and that of 1936, with lands purchased with restricted or trust funds and restricted as to alienation or encumbrance, the earlier statute is not affected by the later, and they may operate in entire harmony.

The other legislation to be considered is the Act of February 27, 1925, c. 359, 43 Stat. 1008. Section 1 of that Act, among other things, authorizes the purchase of "real estate" and various other kinds of property with restricted

or trust funds of members of the Osage tribe of Indians in Oklahoma. Section 3 provides in part:

> "Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth, shall not be subject to the lien of any debt, claim, or judgment *except taxes*, or be subject to alienation, without the approval of the Secretary of the Interior." (Italics supplied.)

It is evident from an examination of the whole statute that the property comprehended in the language "Property of Osage Indians * * * purchased as hereinbefore set forth * * *" is that purchased pursuant to the above-mentioned provision of Section 1, which expressly includes real estate. The provision that the designated property shall not be subject to the lien of any debt, claim or judgment *except taxes* implies that such property shall be subject to taxation. By the terms of the statute, therefore, the lands of Osages not having certificates of competency purchased out of restricted or trust funds are taxable. The question thus arises whether this statutory provision is affected by Section 2 of the Act of June 20, 1936, hereinbefore set out.

The language of the 1936 Act is clear and unambiguous. It declares that "All lands the title to which is now held by *an Indian* subject to restrictions * * * heretofore purchased out of trust or restricted funds of *said Indian* * * * shall be nontaxable * * *." (Italics supplied.) The obvious purpose of the Act is to make nontaxable, lands of *all* Indians purchased out of trust or restricted funds and restricted as to alienation or encumbrance. The statute is clearly a relief measure, and there is no apparent reason why the Congress should desire to exclude any particular tribe of Indians from the relief afforded. The earlier Act does not make, and does not purport to make, the lands in

question taxable. It merely exempts the lands from certain liens and makes it clear that the exemption does not extend to the lien of taxes, to which the lands are ordinarily, and were at that time, subject. There is no conflict between the two statutes. The former exempts a certain class of lands from certain liens not including tax liens, and the latter renders such lands non-taxable.

For the reasons stated, it is my opinion that the Act of June 20, 1936, is applicable to members of the Osage Tribe of Indians in Oklahoma in the same manner and to the same extent that it is applicable to members of other Indian tribes.

Respectfully,

STANLEY REED,
Acting Attorney General.